

ARKANSAS SUPREME COURT

No. CR 86-183 and CR 86-184

KENNY HALFACRE
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered March 22, 2007

PRO SE PETITION TO REINVEST
JURISDICTION IN TRIAL COURT TO
CONSIDER A PETITION FOR WRIT
OF ERROR CORAM NOBIS, OR IN
THE ALTERNATIVE, FILE RULE 37.1
PETITION IN CIRCUIT COURT
[CIRCUIT COURT OF JEFFERSON
COUNTY, CR 85-1577, CR 85-1579]

PETITION DENIED.

PER CURIAM

In 1986, Kenny Halfacre, petitioner herein, was convicted in two criminal matters, both of which occurred in Pulaski County, Arkansas. In the first matter, petitioner was convicted of aggravated robbery of the Asher News and Video store, and sentenced to life imprisonment in the Arkansas Department of Correction. We affirmed. *Halfacre v. State*, 292 Ark. 329, 731 S.W.2d 182 (1987).¹ This court subsequently denied his postconviction petition to proceed pursuant to Ark. R. Crim. P. 37.² *Halfacre v. State*, CR 86-183 (Ark. Nov. 9, 1987) (per curiam).

¹The docket number of the matter on appeal was CR 85-183. In circuit court, the case was assigned docket number CR 85-1579.

²Prior to July 1, 1989, a petitioner whose judgment of conviction had been affirmed on appeal was required to petition this court for relief under Criminal Procedure Rule 37.1 and gain leave from this court to proceed under the rule in the circuit court before filing a petition there. Criminal Procedure Rule 37 was abolished by this court effective July 1, 1989. *In the Matter of the Abolishment of Rule 37 and the Revision of Rule 36 of the Arkansas Rules of Criminal Procedure*, 299 Ark. Appx. 573, 770 S.W.2d 148 (1989) (per curiam). Rule 37 was reinstated in a revised form on January 1, 1991. *In the Matter of the Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure*, 303 Ark. Appx. 746, 797 S.W.2d 458 (1990) (per curiam). The revised rule does not require petitioners to gain leave of this court before proceeding in the trial

In the second criminal matter, petitioner was convicted of aggravated robbery of a Red Roof Inn, and sentenced to forty years' imprisonment in the Arkansas Department of Correction. This court affirmed the conviction, but reduced the sentence to twenty years' imprisonment. *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987).³ Subsequently, petitioner sought leave to proceed in circuit court pursuant to Ark. R. Crim. P. 37, and this court denied the petition. *Halfacre v. State*, CR 86-183 (Ark. Nov. 9, 1987) (per curiam).

Now before us is petitioner's pro se petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.⁴ The petition to reinvest jurisdiction in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis after a judgment has been affirmed on appeal only after we grant permission. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam). In the alternative, the petition seeks leave to proceed in circuit court with a petition pursuant to Ark. R. Crim. P. 37.1.

Here, petitioner contends that he has been subjected to double jeopardy in both cases. His legal theory appears to be as follows: as he must be found guilty of robbery in Ark. Code Ann. §5-12-102 as a condition precedent to being found guilty of aggravated robbery in Ark. Code Ann. §5-12-103, the finding of guilt on a charge of aggravated robbery actually constitutes a second conviction for the same offense.⁵ In other words, in every instance involving a charge based on aggravated robbery, the lesser-included offense of robbery must be adjudicated before being able to court if the petitioner was convicted after January 1, 1999.

³In the second criminal matter, the case was assigned the number CR 86-184. In the court below, the docket number was CR 85-1577.

⁴For clerical purposes, the instant pleading was assigned the same docket number as the direct appeal of the judgment.

⁵We note that the petitioner was convicted under the statute in effect at the time of the crimes. See Ark. Stat. Ann. §§ 41-2102(a) and 41-2103 (Repl. 1977).

reach a determination of whether aggravated robbery occurred. Thus, by the very definition of aggravated robbery, double jeopardy automatically attaches to the offense upon a finding that a robbery occurred, thereby preventing the charge of aggravated robbery from ever being reached for adjudication.

Petitioner further claims that the element of robbery is missing from the aggravated robbery statute, the information filed in his case, and the jury instructions utilized at trial. As a result, the State did not, and could not, meet its burden of proving each essential element of the aggravated robbery charge.

While robbery is generally a lesser-included offense of aggravated robbery, petitioner offers nothing to demonstrate that it was a violation of any specific statutory or constitutional provision for the State to charge him with only aggravated robbery. The argument does not constitute grounds to reinvest the trial court with jurisdiction to consider a petition for writ of error coram nobis.

Moreover, even were petitioner's claims appropriate for relief, petitioner has not exercised due diligence as required to obtain relief. There is no specific time limit for seeking a writ of error coram nobis, but due diligence is required in making an application for relief, and in the absence of a valid excuse for delay, the petition will be denied. *Echols, supra*. Due diligence requires that: (1) the defendant be unaware of the fact at the time of trial; (2) he could not have, in the exercise of due diligence, presented the fact at trial; or (3) upon discovering the fact, did not delay bringing the petition. *Id.*

Petitioner does not allege any fact or ruling that was not known and available more than twenty years ago, at the time of his trial or shortly thereafter. A claim is not cognizable in a petition for writ of error coram nobis if it may be properly raised in a timely petition for postconviction relief

pursuant to Ark. R. Crim. P. 37.1 or on direct appeal. *See McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam). Petitioner did raise variations of this issue in both petitions for Rule 37.1 relief, alleging ineffective assistance of counsel for failure to bring the issue to the attention of the trial court. He cannot once again raise the argument as a basis for relief under a writ of error coram nobis.

Petitioner has made no showing of diligence in pursuing a claim cognizable in a proceeding for error coram nobis as grounds for relief. Accordingly, we decline to reinvest the trial court with jurisdiction to consider the petition for writ of error coram nobis.

Petitioner made an alternative request that this court grant leave for him to file a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. Under this rule, as it was in effect when petitioner was convicted, petitions must be filed within three years of the date the judgment was entered, unless there is some ground sufficient to void the judgment absolutely. *Prince v. State*, 315 Ark. 492, 868 S.W.2d 77 (1994) (per curiam). An issue sufficient to void a judgment absolutely must be an issue that will render the judgment a nullity such as a lack of jurisdiction to try the petitioner. *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985).

In the instant matter, petitioner has failed to show a sufficient basis to void the judgment absolutely. Moreover, petitioner previously filed a petition for postconviction relief under Rule 37.1. Rule 37.2(b) specifically prohibits the filing of a subsequent petition unless the first was denied without prejudice to filing a second petition. Petitioner's original petition was not denied without prejudice, and he is not entitled to file a second Rule 37.1 petition.

Petition denied.